IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNITED STATES ex rel.	§	
	§	
MATTHEW A. PEQUIGNOT,	§	
	§	
Relator,	§	
	§	
v.	§	**Civil Action No. 2:08-CV-222**
	§	
THE GILLETTE COMPANY AND THE PROCTER & GAMBLE COMPANY,	§	
	§	
	§	
Defendants.	§	

MOTION TO DISMISS THE AMENDED COMPLAINT UNDER RULE 12(B)(6) FOR FAILURE TO PLEAD WITH PARTICULARITY UNDER RULE 9(B) OR IN THE ALTERNATIVE FOR AN ORDER REQUIRING RELATOR TO RE-PLEAD IN CONFORMITY WITH RULE 9(B)

Defendants The Gillette Company and The Procter & Gamble Company (collectively "Defendants") move to dismiss the amended complaint under Rule 12(b)(6) for failure to meet the standards of Rule 9(b) because the amended complaint does not plead false marking under 35 U.S.C. § 292, a species of fraud, with the required particularity. Alternatively, Defendants respectfully ask the Court to issue an Order requiring Matthew A. Pequignot ("Relator") to re-plead false marking in conformity with Rule 9(b).

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I. INTRODUCTION

False marking under Section 292 is defined as an intentional deceptive act; it is a species of fraud. To state a claim under Rule 12(b)(6), a false marking claim must be pled according to the standards of Rule 9(b). The amended complaint recites numerous allegations of false marking, yet fails to allege the factual bases for those allegations. Because the amended complaint fails to plead with the particularity mandated by Rule 9(b), it should be dismissed for failure to state a claim. Alternatively, Defendants respectfully ask that the Court issue an Order requiring Relator to re-plead false marking in conformity with Rule 9(b).

II. LEGAL STANDARD

A dismissal for failure to comply with Rule 9(b) is a dismissal on the pleadings for failure to state a claim. Fed. R. Civ. P. 9(b), 12(b)(6); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (citation omitted). Rule 9(b) requires that a plaintiff set forth the "who, what, when, where, and how" of an alleged fraud. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (quoting *Williams v. WMX Tech., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997)). While plaintiffs may allege facts "on information and belief" when those facts are "peculiarly within the perpetrator's knowledge," plaintiffs must still set forth a factual basis for their beliefs. *Russell*, 193 F.3d at 308. There is never a "license to base claims of fraud on speculation and conclusory allegations." *Thompson*, 125 F.3d at 903; *see Russell*, 193 F.3d at 309 (warning that any "relaxing of Rule 9(b) is [not] a *qui tam* plaintiff's ticket to the discovery process"); *accord Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (under Rule 12(b)(6), pleading must state "enough facts to state a claim to relief that is plausible on its face").

III. ARGUMENT

A. False Marking Claims Are Properly Subject To Rule 9(b) Standards

False marking claims are properly governed by the standards of Rule 9(b) in light of a plain reading of Rule 9(b) and Section 292, the balance of authority and sound public policy. Rule 9(b) requires that "[i]n *all* averments of fraud . . ., the circumstances constituting fraud . . .

shall be stated with particularity." Fed. R. Civ. P. 9(b) (emphases added). On its face, Rule 9(b) is not limited to common law fraud; it includes *all* claims sounding in fraud. *Pedroli v. Bartek*, 564 F. Supp. 2d 683, 687 (E.D. Tex. 2008) ("Where . . . allegations 'sound in fraud,' [Rule 9(b)] requires the plaintiff to state the circumstances constituting the fraud with particularity.") (citations omitted).

Section 292 defines false marking as an act of deception performed with specific intent to deceive – false marking is a species of fraud. 35 U.S.C. § 292(a) ("Whoever marks upon . . . any unpatented article, the word 'patent' . . . for the purpose of deceiving the public"); *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352 (Fed. Cir. 2005) (equating required intent to deceive to "fraudulent intent") (quoting *Norton v. Curtiss*, 433 F.2d 779, 795-96 (C.C.P.A. 1970)); *see also id.* (citing *Seven Cases of Eckman's Alternative v. United States*, 239 U.S. 510, 517-18 (1916) (interpreting statutory terms "false and fraudulent" to require "intent to deceive")). Courts have acknowledged as much. *E.g.*, *United States ex rel. Scharmer v. Carrollton Mfg. Co.*, 377 F. Supp. 218, 221 (N.D. Ohio 1974) (summarizing false marking claim as a "contention . . . [of] a conscious fraud."); *Haynes v. R.H. Dyck, Inc.*, No. 2:06-CV-02944-MCE-EFB, 2008 U.S. Dist. LEXIS 910, at *4 (E.D. Cal. Jan. 4, 2008) ("The only . . . fraud put forth . . . is the alleged violations of [35 U.S.C. §] 292"). Because false marking sounds in fraud, it is properly subject to Rule 9(b).

Public policy dictates this result because of the dangers inherent in alleged false marking claims. Where, as here, false marking claims implicate numerous patents and products, defending against the claims requires substantial resources, especially where the claims fail to define alleged offenses with any level of specificity.[1] Vague accusations of false marking can be used as a basis for unfounded "fishing expeditions," allowing relators to leverage a few alleged facts into months of expensive, burdensome and complicated discovery. Finally, and perhaps most importantly, false marking claims come cheap: they damage defendants' reputations by

[1] For example, to decide false marking for the thirty-eight (38) utility patents alleged in this case not to cover or protect particular articles, the Court must, at a minimum, *construe each independent claim* in *each patent* and apply that construction to *each article*. *Clontech*, 406 F.3d at 1352. In other words, the amended complaint requires, at a minimum, that the Court construe and apply *one hundred twenty (120) independent claims*.

accusing defendants of fraudulent behavior, yet the relator suffers no injury himself.[2] Numerous complaints can be filed at almost no cost to relators.[3]

These are ***precisely*** the problems Rule 9(b) contemplates. *United States ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 819 (E.D. Tex. 2008) (citations omitted). In light of these concerns, the Fifth Circuit requires *qui tam* claims under the False Claims Act ("FCA") to comply with Rule 9(b),[4] even though the statute does not include the word "fraud."[5] *Qui tam* complaints under Section 292 should comply with Rule 9(b) for the same reasons.[6]

For all of these reasons, false marking claims sound in fraud and are properly subject to the heightened pleading standards of Rule 9(b).

B. The Amended Complaint Fails To Plead False Marking With Particularity

The amended complaint should be dismissed under Rule 9(b) and 12(b)(6) because it fails to plead false marking with particularity. In the alternative, Defendants respectfully ask the Court to issue an Order requiring Relator to plead false marking with particularity.

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[2] *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1992) (Rule 9(b)'s heightened standards "stem[] from the obvious concerns that general, unsubstantiated charges of fraud can do damage to defendant's reputation"); *see also Pequignot v. Solo Cup Co.*, No. 1:07-cv-897 (LMB/TCB), slip op. at 8-9 (E.D. Va. Mar. 27, 2009) ("*Solo Cup*") ("[A]ny harm to Pequignot . . . would be the epitome of harm that is 'conjectural or hypothetical,' rather than 'concrete and actual.' . . . Pequignot . . . fails to allege any actual or imminent injury to himself.") (internal citations omitted).

[3] Relator has filed three false marking complaints against three different defendants in the last eighteen months: *Solo Cup*; *United States ex rel. Pequignot v. The Gillette Co. and The Procter & Gamble Co.*, No. 2:08-cv-222-TJW (E.D. Tex.); and *United States ex rel. Pequignot v. Arrow Fastener Co., Inc.*, No. 2:08-cv-353-TJW-CE (E.D. Tex.). Another patent attorney has filed two false marking complaints, similar in style to Relator's, accusing a total of eight defendants. *Harrington v. CIBA Vision Corp.*, No. 1:08-cv-251 (W.D.N.C.); and *North Carolina Farmers' Assistance Fund, Inc. v. Monsanto Co., et al.*, No. 08-cv-409 (M.D.N.C.). Yet another similarly-styled complaint was recently filed in this District. *United States ex rel. Heathcote Holdings Corp., Inc. v. Church & Dwight Co., Inc.*, No. 2:08-cv-349 (E.D. Tex.).

[4] *Thompson*, 125 F.3d at 903; *Russell*, 193 F.3d at 308.

[5] *See Pedroli*, 564 F. Supp. 2d at 687; *see also United States ex rel. Grynberg v. Alaskan Pipeline Co.*, No. Civ. 95-725 (TFH), 1997 WL 33763820, at *3 (D.D.C. Mar. 27, 1997) ("Rule 9(b) applies where fraud 'lies at the core of the action' – that is, where the complaint accuses a defendant of 'develop[ing] a scheme . . . for the purpose of cheating [another person].'") (quoting *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985)).

[6] Defendants have provided authority expressly linking false marking to fraud. *See Scharmer*, 377 F. Supp. at 221; *Haynes*, 2008 U.S. Dist. LEXIS 910 at *4. This authority distinguishes this case from previous cases in which courts have chosen not to apply Rule 9(b) to Section 292 claims because no such authority was cited as support. *See Astec Am., Inc. v. Power-One, Inc.*, No. 6:07-cv-464, 2008 U.S. Dist. LEXIS 30365 at *33 (E.D. Tex. Apr. 11, 2008); *Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F. Supp. 2d 1314, 1327 (M.D. Fla. 2007).

In paragraphs 307-322, the amended complaint sets forth three basic theories of false marking: (1) counts alleging certain products were purportedly marked with certain patents whose scope "unmistakably" does not cover or protect the marked products ("Scope" counts); (2) counts alleging certain products were marked with certain method patents that purportedly cannot cover or protect an apparatus ("Method" counts); and (3) counts alleging certain products were marked with certain allegedly expired patents ("Expiration" counts). (Dkt. #8 at 27-29.)

1. The "Scope" Counts Fail To Allege A Specific Factual Basis For The Alleged Belief That The Accused Products Were Falsely Marked By Defendants

The "Scope" counts[7] generally recite identical patterns of alleged facts with variable products and patents, *i.e.*, Product X is marked with Patent Y, which allegedly does not have a scope that covers or protects Product X. Count 24 is representative:

> COUNT 24: The '926 Patent
>
> 394. The '926 patent has a scope which does not cover or protect the M3Power Nitro razor product.
>
> 395. DEFENDANTS have marked (or caused to be marked) the packaging of the M3Power Nitro razor product with the '926 patent.
>
> 396. DEFENDANTS' marking was with the intent to deceive the public, and was therefore in violation of 35 U.S.C. § 292(a).

The "Scope" counts do not allege false marking with particularity. These conclusory allegations of intent to deceive are supported with no specific factual allegations. *See Thompson*, 125 F.3d at 903. Even if intent may sometimes be averred generally, Rule 9(b) does not allow a party to "base claims of fraud on speculation and conclusory allegations." *Id.*; *Russell*, 193 F.3d at 308. These conclusory allegations of intent – repeated verbatim throughout the Complaint – fall short of the mark.

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[7] The "Scope" counts include Counts 1, 3-6, 13, 15, 17, 22-24, 26, 28-39, 41-44, 50-53, 56, 58-63, 65-66, 68, 70, 72, 77-78, 80-83, 87-88, 90-91, 96-97, 99-100, 104, 106, 111-112, 114-117, 119, 124-127, 133, 136-137, 140-166, 169-170, 173-180, 182-189, 191-192, 197-198, 200-201, 204, 207, 210-214, 216-231, 233, 235, 241-244, 246, 251-252, 255, 260-265, 267-278, 281, 286-293, 295-314, 316, 321-323, 325-328, 334-338, 340, 345-346, 348-355, 358, 361-367, 370, 373-380, 386, 391-397, 399-413, 418-419, 421-424, 429-431, 433-436, 442-444, 446, 451-452, 454-457, 459, 461, 463, 468-469, 471-473, 476, 479, 482-487, 490, 493, 496-507, 512-513, 515, 518, 521, 524-536, 540-542, 555-556, 558, 563-565, 569-570, 575-576, 578, 581, 584-585, 588-601, 603-604, 609-622, 624-625, 630-641, 643, 646, 648, 650-654, 657, 659-660 and 662-663.

Nowhere does the amended complaint provide ***any*** factual support for its bare conclusions that certain patents "ha[ve] a scope which does not cover or protect" certain products. Even under less stringent standards of pleading, these conclusory allegations would not pass muster. *Bell Atl.*, 127 S. Ct. at 1974; *see, e.g.*, *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008) (dismissing counterclaims pled "without alleging even general facts to support them."); *AntiCancer Inc. v. Xenogen Corp.*, 248 F.R.D. 278, 282 (S.D. Cal. 2007) (dismissing infringement claim because plaintiff "failed to plead any further facts beyond a bare statement of direct and indirect infringement so as to demonstrate a plausible entitlement to relief"); *Bartronics, Inc. v. Power-One, Inc.*, 245 F.R.D. 532, 537 (S.D. Ala. 2007) (dismissing invalidity claim that alleged "no supporting facts of any kind"). Allegations that a patent has a certain scope that does not cover a particular product, with no explanation in support, fail to meet the heightened standards of Rule 9(b). *See Williams*, 112 F.3d at 178 (Rule 9(b) requires plaintiff to "explain *why* the statements [allegedly made] were fraudulent.") (emphasis added). At a minimum, the amended complaint should have set forth a specific factual basis for its allegations that certain patents have particular scope, and why that scope "unmistakably" does not "cover or protect" the particular accused articles.

2. The "Method" Counts Fail To Allege A Specific Factual Basis For The Alleged Belief That The Accused Products Were Falsely Marked By Defendants

The "Method" counts[8] generally recite similar alleged facts with variable products and patents, *i.e.*, Product A is marked with Patent B, which is a method patent, which allegedly cannot cover or protect an apparatus, such as Product A. Count 21 is representative:

COUNT 21: The '293 Patent

> 385. Because the '293 patent only contains method claims, the apparatus identified as the M3Power Nitro razor product is not covered or protected by the '293 patent.

[8] The "Method" counts include Counts 9-11, 18-21, 25, 27, 47-49, 55, 57, 73-76, 79, 85-86, 93-95, 98, 107-110, 113, 121-122, 129-130, 135, 138-139, 168, 171-172, 194-196, 199, 206, 208-209, 215, 238-240, 248-249, 257-259, 266, 283-285, 294, 318-319, 331-333, 341-344, 347, 357, 359-360, 369, 371-372, 382-383, 388-390, 398, 415-417, 420, 426-427, 439-441, 447-450, 453, 464-467, 470, 478, 480-481, 492, 494-495, 509-511, 514, 520, 522-523, 538-539, 561, 572-574, 577, 583, 586-587, 606-608, 627-629, 645 and 658.

> 386. DEFENDANTS have marked (or caused to be marked) the packaging of the M3Power Nitro razor product with the '293 patent.
>
> 387. DEFENDANTS' marking was with the intent to deceive the public, and was therefore in violation of 35 U.S.C. § 292(a).

The "Method" counts do not allege false marking with particularity. Again, Relator's boilerplate intent pleadings are not supported with any specific factual allegations and are inadequate under Rule 9(b). *Thompson*, 125 F.3d at 903; *Russell*, 193 F.3d at 308.

The "Method" counts also provide no factual basis – specific or otherwise – for the allegation that the claimed methods do not cover or protect the particular marked article. At a minimum, the amended complaint should have set forth a specific factual basis for allegations that certain method patents have particular scope and why that scope does not "cover or protect" the particular accused articles. *Bell Atl.*, 127 S. Ct. at 1974; *Williams*, 112 F.3d at 178.

The need for adequate supporting facts is particularly acute here, because Relator's "Method" counts all rest on an untenable assumption that method claims, *per se*, cannot "cover or protect" an apparatus.

That assumption is simply not true as a matter of law. A competitor can directly infringe methods of manufacture by making an apparatus.[9] *See, e.g.*, *Hoover Group v. Custom Metalcraft Inc.*, 66 F.3d 299, 304-05 (Fed. Cir. 1995) (finding competitor's product infringed apparatus claim; remanding to determine whether method of manufacture claims were also infringed). Method claims can also be infringed indirectly by a competitor when it either induces or contributes to directly infringing uses of an apparatus that it sells. 35 U.S.C. §§ 271(b), 271(c); *see, e.g.*, *nCube Corp. v. SeaChange Int'l, Inc.*, 436 F.3d 1317, 1325 (Fed. Cir. 2006) ("The record shows that [a competitor] sold . . . systems for use with [other] equipment with the intent that customers would use them to perform the patented method"); *Ricoh Co. v. Quanta Computer Inc.*, 550 F.3d 1325, 1337 (Fed. Cir. 2008) ("It appears to be undisputed that . . . [a competitor] would be liable under § 271(c) if it imported into or sold within the United States a bare component (say, a microcontroller containing routines to execute the patented methods)").

[9] Each of these so-called "method patents" recites at least one method of manufacture.

Indeed, the law actually ***requires*** marking with patents containing method claims under certain circumstances.[10] *See* 35 U.S.C. § 287(a); *Am. Med. Sys. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1538-9 (Fed. Cir. 1993) ("[T]o the extent that there is a tangible item to mark by which notice of the asserted method claims can be given, a party is obliged to do so"); *see, e.g.*, *Soverain Software LLC v. Amazon.com, Inc.*, 383 F. Supp. 2d 904, 911 (E.D. Tex. 2005). Because the contention that method claims, *per se,* cannot "cover or protect" an apparatus is not true as a matter of law, there is additional reason to require Relator to plead an adequate factual basis to support the "Method" counts.

3. The "Expiration" Counts Fail To Allege A Specific Factual Basis For The Alleged Belief That The Accused Products Were Falsely Marked By Defendants

The "Expiration" counts[11] generally recite the same pattern of alleged facts with variable products and patents, *i.e.*, Product Q is marked with Patent Z, which has expired and no longer protects Product Q. Count 560 is representative:

> COUNT 560: The '361 Patent
>
> 2029. During any time after the expiration of the '361 patent, the patent did not then protect the SensorExcel razor product with any right of patent exclusivity or other remedy provided by the patent laws.
>
> 2030. DEFENDANTS have marked (or caused to be marked) the packaging of the SensorExcel razor products with the '361 patent after the '361 patent expired.
>
> 2031. DEFENDANTS' marking was with the intent to deceive the public, and was therefore in violation of 35 U.S.C. § 292(a).

The "Expiration" counts fail to plead false marking with particularity. Relator uses the same generic intent allegations, which are not supported by specific factual allegations. *Thompson*, 125 F.3d at 903; *Russell*, 193 F.3d at 308.

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[10] At least one of the so-called "method patents" actually claims an apparatus, as well as methods of manufacture.

[11] The "Expiration" claims include Counts 1-8, 12-16, 39-46, 50-54, 59, 62-64, 67-71, 83-84, 87-92, 101-105, 117-120, 123, 127-128, 131-134, 166-167, 191-193, 202-205, 232-237, 241-242, 244-247, 250, 253-256, 279-282, 314-317, 320, 324-330, 335-339, 335-339, 355-356, 367-368, 379-381, 384-387, 395, 412-414, 423-425, 428, 432-438, 443-445, 458-462, 474-477, 488-491, 507-508, 516-519, 535-537, 540, 543-560, 562-568, 570-571, 579-582, 602-605, 623-626, 642-644, 646-649, 654-656 and 661-711.

No facts are alleged to support the allegation that Defendants marked certain products (or their packaging) after certain patents expired. The amended complaint improperly equates the presence of marked articles on retail shelves with the time articles were marked. (*See* Dkt. #8, Exhs. A-KKKK.) Without a specific factual basis to support the allegation that the articles in question were falsely marked ***when marked***, as opposed to when Relator saw them on retail shelves, the amended complaint fails to provide a plausible entitlement to relief under any standard. *Bell Atl.*, 127 S. Ct. at 1974; *Williams*, 112 F.3d at 178.

4. The Amended Complaint Improperly Avers Many Facts "Upon Information And Belief"

As a general rule, "pleadings of fraud cannot be based on information and belief." *Foster*, 587 F. Supp. 2d at 819 (citing *Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1003 (2d Cir. 1988)). The lower standard is available only "when the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge . . . ." *Russell*, 193 F.3d at 308. Yet even under the "information and belief" standard, plaintiffs must still set forth the factual basis for their beliefs. *Id.*; *Thompson*, 125 F.3d at 903 (warning that lower standard "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.").

The amended complaint should be dismissed because it alleges facts "upon information and belief" without providing a specific factual basis to support the allegations. Specifically, the amended complaint alleges the following facts "upon information and belief":

- that Defendants knew the expiration dates of certain patents (Dkt. #8, ¶¶ 15, 19, 23, 27, 31, 35, 39, 43, 47, 51, 55, 59, 63, 67, 71, 74, 78, 82, 85, 89, 92, 96, 100, 104, 108, 112, 116, 120, 124, 128, 132, 137, 142, 147, 152, 157, 162, 167, 172, 176, 181, 186, 191 and 196);
- that Defendants know that certain products "are marked with expired patents" (*id.* ¶ 311);
- that Defendants know that certain products "are marked with method patents" (*id.* ¶ 314);
- that Defendants know that certain products "are marked with patents having scopes which unmistakably do not cover the products on which such patents are marked" (*id.* ¶ 316);
- that before Defendants merged, Defendant The Gillette Company "falsely marked [certain] products . . . bearing the brand labels 'Gillette,' 'Oral-B' or 'Right

Guard,' with expired patents, method patents and patents which unmistakably did not cover the products" (*id.* ¶ 319);

- that after Defendants merged, at least one of Defendants "falsely marked [certain] products . . . bearing the brand labels 'Gillette,' 'Oral-B' or 'Right Guard,' with expired patents, method patents and patents which unmistakably did not cover the products" (*id.* ¶ 320); and
- that Defendants' alleged "marking of their products with the numbers of expired patents, the numbers of method patents, and/or the numbers of patents having scopes which do not cover the marked products, . . ., has wrongfully quelled competition with respect to such products thereby causing harm to Plaintiff, the United States, and the public" (*id.* ¶ 2536).

The amended complaint fails to satisfy Rule 9(b) because no specific facts are alleged that could form a factual basis for these facts Relator pleads upon "information and belief." *Russell*, 193 F.3d at 308; *Thompson*, 125 F.3d at 903; *see also In re Papst Licensing GmbH & Co. KG Litig.*, 585 F. Supp. 2d 32, 34 (D.D.C. 2008) (dismissing infringement complaint where infringement averred "upon information and belief" because "[t]he Complaint merely speculates that [the accused infringer] might have infringed . . . and notifies [the accused infringer] and the Court that [plaintiff] intends to investigate whether [plaintiff] has an infringement claim").

IV. CONCLUSION

The amended complaint should be dismissed under Rule 12(b)(6) for failure to plead false marking with particularity under Rule 9(b). In the alternative, Defendants respectfully request that the Court issue an Order requiring Relator to re-plead false marking in conformity with Rule 9(b).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this 15th day of April, 2009.

/s/ David M. Maiorana
David M. Maiorana